

## Appellate Jurisdiction of the Courts of Appeals in Ohio

Prior to its amendment in 1944, Article IV, Section 6, of the Ohio Constitution read: "The Courts of Appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in the trial of *chancery cases*, and to review, affirm, modify, or reverse the judgments of the Courts of Common Pleas, Superior Courts and other courts of record within the district as may be provided by law. . ." As amended, the constitution reads: "The Court of Appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and such jurisdiction as may be provided by law to review, affirm, modify, set aside, or reverse judgments or final orders of boards, commissions, officers, or tribunals and courts of record inferior to the Court of Appeals within the district. . . All laws now in force, not inconsistent herewith, shall continue in force until amended or repealed; . . ."

To implement the amendment, the Judicial Council advised the General Assembly that the amended Article IV, Section 6, was not self-executing and that the General Assembly was vested with the authority to designate the kinds of cases in which there could be a trial de novo in the Courts of Appeals and to provide generally for the jurisdiction of the Court.

The 96th General Assembly, however, did not enact a statute establishing the appellate jurisdiction of the Courts of Appeals and a number of the courts decided that since the General Assembly had not acted to define their jurisdiction, they no longer had appellate jurisdiction in the trial of chancery cases and therefore no right to hear the case de novo.<sup>1</sup> On December 18, 1946, the Supreme Court of Ohio had the jurisdictional question squarely presented in *Youngstown Municipal Ry. v. City of Youngstown*.<sup>2</sup> In that case an action was instituted in the Court of Common Pleas by the Youngstown Municipal Railway Company to enjoin the city of Youngstown from levying and collecting a local ordinance-imposed license tax upon the operation of trackless trolleys on the public streets of Youngstown. The Common Pleas Court rendered a decree in favor of the defendants after finding the tax valid. The Youngstown Railway Company then appealed to the Court of Appeals on questions of law and fact, whereupon the court held that the 1944 Amendment to Article IV, Section 6, terminated the Courts of Appeals' appellate jurisdiction in the trial of chancery cases and that the appeal then

<sup>1</sup> *Youngstown Municipal Ry. v. City of Youngstown*, Ohio App. (unreported). *Sicker v. Powers*, 74 N.E.2d 638 (Ohio App. 1946).

<sup>2</sup> 147 Ohio St. 221, 70 N.E.2d 649 (1946).

pending before the court as a chancery case should be dismissed. An appeal was then prosecuted to the Ohio Supreme Court which held that the Ohio Constitution as amended empowers the General Assembly to establish the appellate jurisdiction of the Court of Appeals, but until action be taken by the legislative body, the appellate jurisdiction remains as it was before the constitutional amendment. The judgment of the Court of Appeals was reversed and the cause remanded for a trial de novo.

Ohio's courts exist by virtue of constitutional provision, but their jurisdiction was, prior to 1912, established by the legislature. The Ohio Constitution of 1802 established a Court of Common Pleas and a Supreme Court. The provisions were to the effect that the Supreme Court should have original and appellate jurisdiction "both in common law and chancery, in such cases as shall be directed by law."<sup>3</sup>

In 1851, the Ohio Constitution created the District Court and that court was given "such appellate jurisdiction as may be provided by law." Section 12 provided that "district courts, shall, in their respective counties, be the successors of the present supreme court."<sup>4</sup> In exercising the power thus given by Article IV, Section 6, of the constitution, the legislature on March 23, 1852 provided that appeals from "final judgments in civil cases at law, decrees in chancery" in the Common Pleas Courts and Superior Courts should be made to the District Court.<sup>5</sup>

By the Code of Civil procedure adopted in 1853, law and equity were fused into a single system. Before the adoption of the Code, issues of fact in equity cases were tried by the court, but upon the fusion of law and equity in 1853, the following provision, which is now Ohio General Code Section 11379, was adopted and provided: "Issues of fact arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury, unless a jury trial be waived, or a reference be ordered as hereinafter provided."<sup>6</sup> Prior to 1853 the trial of issues of fact in equity cases was, of course, for the court and on appeal, a second trial was permitted because of the absence of a jury trial. Judge Nichols in referring to the principle of one trial and one review, stated in *Wagner v.*

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<sup>3</sup> OHIO CONST. Art. III, §§ 1, 2 (1802).

<sup>4</sup> Reference to the "present supreme court" relates to the two judges on the circuit as distinguished from the Supreme Court in banc sitting in Columbus. *Webster v. State*, 43 Ohio St. 696, 699, 4 N.E. 92, 94 (1885).

<sup>5</sup> 50 Ohio Laws 93.

<sup>6</sup> 51 Ohio Laws 57, § 263. See *Wall v. Dayton Federation Co.*, 121 Ohio St. 334, 168 N.E. 847 (1929); *Chapman v. Lee*, 45 Ohio St. 356, 13 N.E. 736 (1887); *Lange v. Lange*, 69 Ohio St. 346, 69 N.E. 611 (1904); *Fisher v. Bower*, 79 Ohio St. 248, 87 N.E. 256 (1909); *Gunsaulus v. Pettit*, 40 Ohio St. 27, 17 N.E. 231 (1888). *Contra*: *Swanson v. Alworth*, 168 Minn. 84, 209 N.W. 907 (1926).

*Armstrong*: "This principle had its inception in the purpose of limiting to one review cases which had been tried by juries, where not only the trial judge, but twelve citizens of the state sitting as a jury, had determined the rights of the parties. In cases where one man sitting as a court of equity has determined the issues, it is only substantial justice that a de novo hearing be had." In accord with this principle on April 12, 1858, the Act of March 23, 1852 was amended and appeals were permitted from the Court of Common Pleas to the District Court from all final judgments, orders or decrees in civil actions in which the parties did not have the right to demand a trial by jury.<sup>8</sup> Under this procedure if a right to a trial by jury existed, a second trial of the facts in the appellate court would not result even if the case were equitable in nature, for if the right to the trial by jury existed, the right to appeal was barred by the statute.

The practice followed for 110 years was abandoned on September 3, 1912 when the Courts of Appeals were created and Article IV, Section 6, of the constitution was amended.<sup>9</sup> The legislature, in attempting to continue the same practice of avoiding a trial de novo when the right to a jury trial existed, enacted Ohio General Code Section 12224 on April 29, 1913.<sup>10</sup> The code read: "In addition to the cases and matters specially provided for, an appeal may be taken to the court of appeals by a party or other person directly affected, from a judgment or final order in a civil action rendered by the common pleas court, and of which it had original jurisdiction if the right to demand a jury therein did not exist. . . ." In *Wagner v. Armstrong, supra*, the court held that Ohio General Code Section 12224 was unconstitutional because it attempted to enlarge the appellate jurisdiction of the Courts of Appeals which had been fixed by the constitutional amendment.<sup>11</sup> These self-executing provisions

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<sup>8</sup> 93 Ohio St. 443, 460, 113 N.E. 397, 401 (1916).

<sup>9</sup> 55 Ohio Laws 82. This section was amended in 65 Ohio Laws 211, but was not changed materially insofar as it related to appellate jurisdiction. The constitution was amended on October 9, 1883 and the Circuit Court succeeded the District Court with "such appellate jurisdiction as may be provided by law." Such law was passed on February 7, 1885 by the General Assembly as follows: "An appeal may be taken to the circuit court by a party or other person directly affected, from a judgment or final order in a civil action rendered by the common pleas court, and of which it had original jurisdiction, if the right to demand a jury therein did not exist." 82 Ohio Laws 32 (Section 5226, Revised Statutes). (1896 7th ed.)

<sup>10</sup> See opening paragraph, this comment.

<sup>11</sup> 103 Ohio Laws 429.

<sup>12</sup> Cf. *Cincinnati Polyclinic v. Balch*, 92 Ohio St. 415, 111 N.E. 159 (1915). Appellate procedure, however, was not fixed by the constitution and the General Assembly enacted the Appellate Procedure Act effective January 1, 1936. 116 Ohio Laws 104; *Realty Co. v. Cleveland*, 140 Ohio St. 432, 45 N.E. 2d 209 (1942); *Barnes v. Christy*, 102 Ohio St. 160, 131 N.E. 352 (1921).

in the constitution were the first in the history of the state of Ohio relative to the subject of appellate jurisdiction.<sup>12</sup>

After the 1912 amendment, Ohio General Code Section 11379, of course, remained in effect so that if the relief sought was a judgment for money only, a right to a jury trial existed. At the same time, Article IV, Section 6, of the constitution allowed an appeal in "chancery cases." According to the decision in the *Youngstown Municipal Railway* case, *supra*, this appellate jurisdiction remained intact, notwithstanding the 1944 constitutional amendment to Article IV, Section 6, omitted the words "chancery cases." The law today stands as before the 1944 amendment and upon examination of that law, an anomaly may be found. This anomaly violates the principle of one trial and one review expounded by Judge Nichols in *Wagner v. Armstrong*. The anomaly is well stated in *Ireland v. Cheney*<sup>13</sup> when Judge Williams comments that, "Many cases formerly not appealable because they were actions for money only and triable to a jury within the meaning of Sections 5130 and 5226, Revised Statutes, are now appealable because they are chancery cases." Therefore under the doctrine enunciated in the *Youngstown Municipal Railway* case, a jury trial may be had if the action is for money only and a retrial on appeal might also be had in the same action if the case were a "chancery case," that is, one which prior to 1853, would have fallen within the jurisdiction of equity.<sup>14</sup> This may be illustrated by the *Gunsaulius* case,<sup>15</sup> in which the primary relief sought was a money judgment, but the case was of an equitable nature and but for the bar of Section 5226, would have been appealable. As Section 5226 no longer is in effect, it is now possible to have cases in which a jury trial may be had in the lower court and a trial de novo on appeal.<sup>16</sup> In *Ireland v. Cheney*, *supra*, Judge Williams further illustrates this possibility in cases of equitable subrogation and contribution.

Was this anomaly in the minds of the framers of the amendment in 1912 or of the Judicial Council who proposed the 1944 amendment? In an attempt to conform to the former practice, a proposal was introduced in the 1912 constitutional debates for the purpose of giving the Courts of Appeals jurisdiction to try de novo cases wherein the right to a jury trial did not exist.<sup>17</sup> This proposal was tabled.<sup>18</sup> If this proposal had been adopted, the anomaly would

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<sup>12</sup> 1 OHIO JUR., "Historical Introduction," Clarence B. Laylin, Esq.

<sup>13</sup> 129 Ohio St. 527, 196 N.E. 267 (1935).

<sup>14</sup> *Wagner v. Armstrong*, *supra*, note 7.

<sup>15</sup> *Gunsaulius v. Pettit*, 46 Ohio St. 27, 17 N.E. 231 (1888).

<sup>16</sup> Bayly, *Motion for New Trial and Time for Appeal*, 7 OHIO ST. L. J. 293, 303, n.25 (1941).

<sup>17</sup> Constitutional Convention of Ohio (1912), *Proceedings and Debates*, Vol. II, p. 1147.

<sup>18</sup> II *id.* at 1157.

never have arisen because an appeal could not have been effected in cases where a right to a jury trial existed in the lower court. The matter was brought up again during the convention and the language found in the constitution as amended in 1912 was inserted.<sup>19</sup> This language gave the right to an appeal in those cases termed "chancery cases." The convention at the time of the introduction of this language was under the impression that the phrase "appellate jurisdiction in the trial of chancery cases" limited the right of appeal to chancery cases in which the right to a jury trial did not exist below.<sup>20</sup> The original proposal had been voted down evidently because of a misapprehension as to its meaning.<sup>21</sup> If the intent of the convention had been strictly followed, a trial de novo would have existed only in those chancery cases in which there had been no right to a jury trial below. Judge Nichols in *Wagner v. Armstrong* seemingly did not follow the intent of the convention as he concluded that appeals would be had in all "chancery cases" even though a right to a trial by jury existed below. As a result of Judge Nichols' holding, an anomalous situation could result, an appeal in a chancery case in which the right to a jury trial existed below.<sup>22</sup> The convention had the anomaly in mind but failed adequately to provide against it.

To ascertain whether the sponsors of the 1944 amendment had this anomaly in mind it is necessary to examine the "objective footprints" left by the sponsors so that the "intent" of the amendment may be discovered. "If the legislative intent has meaning for the interpretive process it means not a collection of subjective wishes, hopes and prejudices of individuals, but rather the objective footprints left on the trail of legislative enactment."<sup>23</sup> Applying this same principle to constitutional interpretation, we may turn to the statement issued by the sponsors of the 1944 amendment in hopes of finding an objective pattern indicating the purpose of the amendment. The statement is not one of great clarity. It does state that confusion has arisen from the 1912 amendment conferring appellate jurisdiction in chancery cases on the Courts of Appeals. This confusion emanates from the attempted categorization of "chancery cases." The statement indicates that the General Assembly will be given power to designate the type of cases in which an appeal will lie, and therefore the problem of categorization is left to the legislature, not to the courts. It further states, "This amendment does

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<sup>19</sup> II *id.* at 1827.

<sup>20</sup> II *id.* at 1829.

<sup>21</sup> *Ibid.*

<sup>22</sup> The irony of the situation is that such an interpretation violates the principles stated at the close of the opinion and previously quoted herein.

<sup>23</sup> 2 SUTHERLAND, STATUTORY CONSTRUCTION § 4506, (3rd ed., Horack, 1943).

not eliminate the trial de novo. It places the procedure where it was before the amendment of the constitution in 1912." Again, it indicates, "The right to trial de novo in cases in which no right of trial by jury existed was an integral part of the jurisprudence of Ohio for more than sixty years." At this point it would seem that the sponsors were very much in favor of the appellate procedure existing before 1912 which barred the anomalous right to appeal in cases wherein the right to a jury existed, but it is difficult to see from the statement that the sponsors had the elimination of the anomaly objectively in mind in sponsoring the amendment. It is also difficult to determine why the sponsors mentioned the elimination of the phrase "appellate jurisdiction in the trial of chancery cases," if they did not believe that such elimination would have an immediate legal consequence upon the amendment. Yet the statement indicates that the trial de novo is not eliminated and procedure is the same as that existing prior to 1912. Just how the amendment places procedure as it was before 1912 is also difficult to determine. The footprint of the amendment's trail of enactment is far from clear, insofar as elimination of the inconsistency is concerned. There is a strong indication, however, that the amendment was for the purpose of ridding the courts of the problem of classifying and categorizing "chancery cases." This might well be of invaluable assistance in determining the courts' appellate jurisdiction after the 1944 amendment, for if the purpose was to relieve the courts of the task of categorizing "chancery cases" as well as giving the legislature that power, the courts' appellate jurisdiction in "chancery cases" might well have been deemed at an end as of the effective date of the amendment.

The interpretation of the 1944 amendment given in the *Youngstown Municipal Railway* case nevertheless allows such categorization by the courts to continue, and if the sponsors of the 1944 amendment were of the opinion that categorization of "chancery cases" created confusion, that confusion is still with us. So also are the laws that will allow a trial de novo on appeal in chancery cases when a jury trial by right may be had below. The Supreme Court placed especial emphasis in the *Youngstown Municipal Railway* case on the words "all laws now in force, not inconsistent herewith, shall continue in force until amended or repealed." The word "laws" was used in a generic sense and hence interpreted to mean both statutory and constitutional law and extended to apply to Section 6 of Article IV, the very section that was amended. No authority was quoted for such an interpretation and it is somewhat doubtful if any could be found. It might well have been argued that Article IV, Section 6, prior to the amendment was inconsistent with the amendment, inasmuch as appellate jurisdiction in the trial of "chancery cases" was conferred upon the Court of Appeals be-

fore the amendment and by the very language of the amendment, the phrase "appellate jurisdiction in the trial of chancery cases" was omitted. This fact plus the desire of the sponsors to eliminate confusion caused in the attempted categorization of "chancery cases" by the courts might well have been a sufficient basis upon which the appellate jurisdiction of the Courts of Appeals could have been deemed at an end until legislative action again conferred appellate power upon the court. The inconsistency in the law and the confusion still reign notwithstanding the *Youngstown Municipal Railway* case, although the case defined the courts' appellate jurisdiction and interpreted the 1944 amendment as a grant of legislative power whereby the confusion and inconsistency might be eliminated. It may well be that the decision of the court was somewhat influenced by the desirability of the Court of Appeals' retention of jurisdiction, the absence of which would have also created confusion.

Several bills have been formulated by the 97th General Assembly (1947-48). H.B. No. 205 and Sub. H.B. No. 205 both propose to confer jurisdiction upon the Courts of Appeals to retry the facts in enumerated cases, ten in number, in which an appeal on questions of law and fact may be had.<sup>24</sup> This enumeration of cases as evidenced by H.B. No. 205 and Sub. H.B. No. 205 is a method of circumvention rather than a direct attack on the problem, for such a categorization of chancery cases might not be all inclusive. Before the 1912 amendment to Article IV, Section 6, an appeal was allowed in those cases in which there was no right to a jury trial. This procedure not only eliminated any possibility of confusion that would have arisen in categorization had the appeals been limited to "chancery cases," but it was also consistent with the fundamental

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<sup>24</sup> Those actions which the bills categorize as appealable in the equity sense are actions in which the primary relief sought is:

- (1) The construction or the enforcement of a trust, including the enforcement or establishment of constructive or resulting trusts.
- (2) The establishment or enforcement of equitable estates rising from the conversion of property.
- (3) The foreclosure of mortgages and marshalling of liens including statutory liens.
- (4) The appointment, removal and control of trustees and receivers.
- (5) The restraint of commission of torts.
- (6) The reformation and cancellation of instruments in writing.
- (7) The restraint of actions or judgments at law.
- (8) The quieting of title to property, including the partition thereof.
- (9) The specific performance of contracts.
- (10) Injunction, accounting, subrogation or interpleader.

principles of justice as set out by Chief Justice Nichols, *supra*, inasmuch as no appeal was allowed in those cases in which a right to a jury trial was had below.

Ohio General Code Section 12224, long since laid to rest after having been declared unconstitutional in *Wagner v. Armstrong* may well serve as a pattern for future legislation establishing the appellate jurisdiction of the Courts of Appeals. Today, after the 1944 amendment to Article IV, Section 6, the legislature has the power to re-enact Ohio General Code Section 12224 and perhaps in the not too distant future this statute granting an appeal in those cases in which the right to a jury trial is denied below, may be discovered and revitalized by the General Assembly so that consistency and stability may be restored in the field of the appellate jurisdiction of the Courts of Appeals in Ohio.

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## Absolute and Qualified Nuisance in Ohio

May a plaintiff, in Ohio, recover damages from a defendant city for injuries which she received when a car in which she was riding struck a tree at the edge of a street and in the right of way, no negligence being shown on the part of the city?<sup>1</sup> May a plaintiff, injured when she fell down a flight of stairs on a footbridge while momentarily blinded by a sudden burst of smoke from defendant's locomotive below the bridge, recover without alleging and proving negligence on the part of the defendant railroad?<sup>2</sup> Is a defendant city liable for damages resulting to plaintiff's warehouse when a water-main, weakened by the city's raising the level of the street containing it, burst, flooding the warehouse, plaintiff basing its action on nuisance, without a showing of negligence?<sup>3</sup> The Supreme Court of Ohio, in three recent decisions, answered these questions in the negative, holding that, in none of these cases did defendant's act constitute an absolute nuisance, for which there would be liability without a showing of negligence.

This entire field of nuisance in Ohio has been vague and indefinite and the Supreme Court, particularly in the *Taylor* case, has sought to bring some order to this branch of tort law by setting up two classes of nuisance: those which are absolute or nuisances per se for which liability attaches without fault, and those which

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<sup>1</sup>*Taylor v. Cincinnati*, 143 Ohio St. 426, 55 N.E.2d 724, 155 A.L.R. 44 (1944).

<sup>2</sup>*Metzger v. Pennsylvania, O. & D. Ry.*, 146 Ohio St. 406, 66 N.E.2d 203 (1946).

<sup>3</sup>*Interstate Sash and Door Co. v. Cleveland*, 148 Ohio St. 325, 74 N.E.2d 239 (1947).